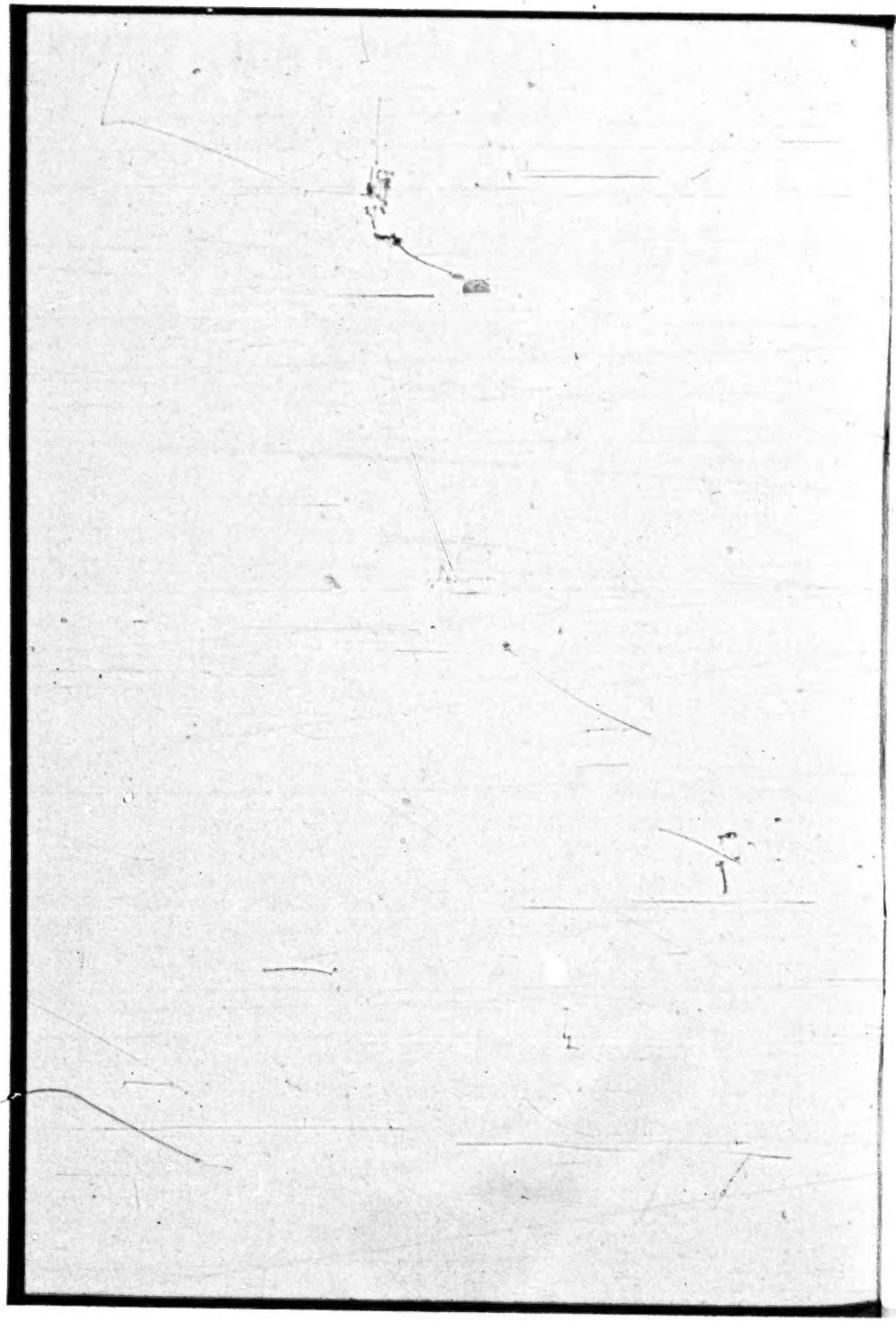

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1765

SYLVIA MEEK, *et al.*, *Appellants*

v.

JOHN C. PITTINGER, *et al.*, *Appellees*

and

JOSE DIAZ, *et al.*,

Appellees

and

JOHN P. CHESIK, on his own behalf and on behalf of his daughter, EMILY, *et al.*,

Appellees

MOTION TO AFFIRM

Intervening appellees, John P. Chesik, et al. by their attorneys, Duane, Morris & Heckscher, move under Rule 16 to affirm the judgment of the three judge court below, on the grounds that plaintiffs below have failed to offer any evidence that the effect of the Acts is other than their stated purpose. The Acts, being clearly constitutional on their face, present no substantial federal question warranting plenary review by this Court.

QUESTIONS PRESENTED

1. Do Acts 194 and 195, amending the Pennsylvania Public School Code to permit pre-existing administrative units of the Department of Education to extend to non-public school children certain secular, neutral and non-ideological benefits presently available to public school children, violate the Establishment Clause of the First Amendment to the United States Constitution?

2. Have plaintiffs met their burden of proving that the Acts, as applied, differ from their stated secular legislative purpose, i.e. to aid all children of the Commonwealth "to develop to the fullest their intellectual capacities"?

STATEMENT OF THE CASE

I. The Statutes Involved.

Acts 194 and 195,[1] which became law on July 12, 1972, amended the Pennsylvania Public School Code of 1949[2]

1. The Legislative Findings & Declaration of Policy for Act 194 state:

> " a) Legislative Finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this Act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.*" (Emphasis added) (Appendix to Jurisdictional Statement pp. 108a-109a.) (Henceforth such references will be designated merely p. 1a, etc.)

Those for Act 195 state:

> " a) Legislative Findings; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, textbooks and instructional materials free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive textbooks or instructional materials from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure* such a distribution of such educational aids *that every school child in the Commonwealth will equitably share in the benefits thereof.*" (emphasis added) (pp. 112a-113a).

2. 24 P.S. §1-101 to 27-2702.

to authorize the Department of Education to extend certain of the same non-ideological educational benefits to children attending nonpublic schools as are currently given to children in the public schools.[3]

The specific benefits under these Acts are: (1) auxiliary services—i.e., special tutoring in basic learning skills[4]; (2) loan of textbooks "which are acceptable for use in any public, elementary, or secondary school;" and loan of (3) non-sectarian instructional materials and (4) non-sectarian instructional equipment for student use.

The programs established by Acts 194 and 195 are similar to the Federal Elementary and Secondary Education Act, Title II[5], which provides for loan of library books and other printed and published instructional materials, including audio-visual materials and textbooks, to both public and nonpublic school students.

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3. Under various provisions of the Code, the Commonwealth furnishes auxiliary services to pupils attending public schools. See 24 P.S. §§9-951-9-971. The Commonwealth also furnishes textbooks, instructional materials, and instructional equipment to pupils attending public schools. See *e.g.* 24 P.S. §§8-801, 8-807.1.

4. Act 194 defines auxiliary services as follows:

"Auxiliary services' means (1) *guidance*, (2) *counseling and testing services*; (3) *psychological services*; (4) *services for exceptional children*; (5) *remedial and therapeutic services*; (6) *speech and hearing services*; (7) *services for the improvement of the educationally disadvantaged* (such as, but not limited to, teaching English as a second language), and such other *secular, neutral, non-ideological services* as are of benefit to nonpublic school children and *are presently or hereafter provided for public school children* of the Commonwealth." (Numbers and emphasis added for clarity)

5. Federal Elementary and Secondary Education Act of 1965 (as amended), 20 U.S.C. §§821 *et seq.*

II. The Pleadings, the Record, and the Decision Below.

A. *The Pleadings*

Plaintiffs' complaint attacks Act 194 and 195[6] as unconstitutional on their face and as applied in violation of the Establishment and Free Exercise[7] Clauses of the First Amendment.

Plaintiffs filed motions for a temporary restraining order and a preliminary injunction. The application for a temporary restraining order was denied by a duly constituted three judge court.

B. *Trial on the Merits*

On September 10, 1973, the lower court heard testimony and received evidence on the merits concerning the operation, purpose and effect of the Acts.

Plaintiffs' only witness on the establishment issue was an employee of the Department of Education, who stated that the Commonwealth, in administering the Acts, does not inquire as to any religious characteristics of schools attended by students eligible for benefits under the Acts. This is because by definition,[8] the Legislature's only requirements are that the schools meet the standards for fulfilling the state compulsory education requirements and comply with the provisions of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

Plaintiffs then rested, asserting that the Acts were unconstitutional on their face and that no evidence of the

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6. Although appellants, at p. 10 of their brief refer to Act 204, all parties below agreed that plaintiffs' claims concerning Act 204 were decided by *Sloan v. Lemon*, and plaintiffs below thus never pressed that claim.

7. Plaintiffs have apparently abandoned their Free Exercise claim, and must be deemed to have abandoned their attack on the application of the Acts for lack of evidence.

8. Nonpublic school is defined in Acts 104 and 105 in their respective Sections 1(b), pp. 109a and 114a.

application of the Acts was necessary. Plaintiffs were afforded the opportunity to supplement the testimony offered on September 10, 1973, but elected to rest on that record.

All of the defendants' witnesses established that the benefits provided by Acts 194 and 195 had not generally been available to nonpublic school children prior to the passage of the Acts,[9] and that the programs, as administered by the Intermediate Units of the Department of Education and the auxiliary services, supplemented by auxiliary equipment, were of invaluable aid and assistance to children in need of such services as remedial reading, speech therapy, and other similar forms of non-ideological, non-religious instruction.

C. *The Decision Below*

The lower court unanimously affirmed the constitutionality of the textbook provision of Act 195, and also, with one Judge dissenting, the constitutionality of the auxiliary services provided by Act 194, and the instructional materials provisions of Act 195.

It also affirmed, with one Judge dissenting, the constitutionality of the provision under Act 195 of instructional equipment "which from its nature is incapable of diversion to a religious purpose" (p. 46a), and at the same time, unanimously held unconstitutional those sections providing in-

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9. See for example testimony of John Jarvis, Headmaster at Lancaster County Day School to the effect that

(1) remedial reading services not previously available are now being offered to the students;

(2) the school students could now benefit from the film catalogue of the Intermediate Unit, which previously was unavailable to Lancaster County Day School students; and

(3) teacher training programs and seminars previously available only to public school teachers are now available through the Intermediate Unit to nonpublic as well as public school teachers.

structional equipment "capable of diversion to sectarian purposes." (p. 46a)[10]

III. The Decision Below Should be Affirmed.

Plaintiffs have failed totally, after a full evidentiary hearing on the merits, to establish any facts in support of their charges that the purpose or effect of the instant litigation is to advance religion. The decision below should be affirmed because the evidence establishes that:

¶ The primary purpose and effect of the Acts is to aid and advance the educational skills of children.

¶ They are not the kind of "class legislation" condemned by the majority in *Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (parent reimbursement) and related cases. The full record establishes that the purpose and effect of Acts 194 and 195 is to extend, on an equal basis to children attending *nonpublic* schools, the same secular educational benefits currently given to children attending *public* schools.

¶ The programs being attacked deal with secular, non-ideological, self-policing, educational services and related equipment. They are administered by the state through the same Intermediate Units of the Department of Education that administer the same kind of benefits for public school children. Hence, there is no need for the kind of administrative policing and entanglement that caused the majority of the court in *Lemon v. Kurtzman* (i.e., direct payments to individual schools and religious orders for the purchase of non-sectarian educational services).

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10. No appeal was taken from this aspect of the lower court's order and subsequent references in this brief to instructional equipment refer only to such equipment as is incapable of diversion to sectarian uses.

¶ The textbooks, educational services and related equipment are for the direct and sole benefit of the children—and no funds are given to any religious order or institution. Hence, these Acts do not have the potential for religious divisiveness in the legislative halls that some of the Justices were concerned about in *Lemon v. Kurtzman*, *supra*.

This Court's action affirming *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *affd.* — U.S. —, No. 73-120, 73-121, June 17, 1974, has no application here because of fundamental differences between the New Jersey and Pennsylvania legislation. Among other things, the New Jersey Act was class legislation that conferred a special benefit not available to parents of public school children or parents of nonpublic school children (i.e., reimbursement to parents for textbooks purchased for and owned by nonpublic school students, contrasted with merely *loaning* books to public school children). Likewise the New Jersey legislation had entanglement problems not present here. (See Section II B below).

The Decision Below

The majority opinion of the court below in this case correctly applied the precepts set forth in the opinions of this Court concerning the Establishment Clause of the First Amendment.[11]

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11. The lower court applied the criteria set forth by Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> "First, the statute must have a secular legislative purpose;
>
> Second, its principal or primary effect must be one that neither advances nor inhibits religion; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968);
>
> Finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613. (paragraphs supplied for clarity)

A. *Primary Purpose*

It is clear, as the court below found, and indeed plaintiffs concede, that the legislative recitals set forth in footnote 1 above indicate a proper secular purpose.

B. *Primary Effect*

After analyzing the various opinions in this Court concerning primary effect (p. 17(a), *et seq.*),[12] the court below held that the provisions of the Acts here on appeal did not have the primary effect of advancing religion.

Appellants in seeking a reversal argue unconstitutionally in that:

the benefits provide a subsidy to religious schools;

the state must provide continued surveillance to ensure secularity.

Neither the facts or decisions of this Court support plaintiffs' position.

1. *Plaintiffs Failed to Meet their Burden of Proof.*

Appellants have the burden to establish evidence of unconstitutionality. This they failed to do. They offered no evidence to show that the Acts in operation differed from their stated legislative purpose. They offered no evidence that the purpose or effect was to advance religion.

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12. *Committee for Public Education and Religious Liberty, PEARL v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty, PEARL* 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 472 (1973).

2. *An Incidental Benefit to a Religious Institution Does Not Advance Religion.*

Appellants in arguing "subsidy", ignore a long unbroken line of cases holding that state or federal aid which has only an indirect or incidental effect that may benefit religious institutions is not *per se* unconstitutional.[13]

3. *The Pennsylvania Acts Meet the Four-Fold Criteria Established by Mr. Justice Powell in the Court's Opinion in PEARL v. Nyquist and Sloan v. Lemon.*

This Court, in its opinion in *PEARL v. Nyquist* and *Sloan v. Lemon*, analyzed in depth the limits of permissible state aid for education which does not have the primary effect of advancement of religion. It laid down a four-fold test which, among other things, totally rejects the subsidy argument advanced by appellants.[14]

To pass constitutional muster under the foregoing cases, the projected state aid

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13. *PEARL v. Nyquist*, 413 U.S. 756, 775 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973); *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973); *Norwood v. Harrison*, 413 U.S. 455, 468 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970); *Board of Education v. Allen*, 392 U.S. 236, 244 (1968); *Everson v. Board of Education*, 330 U.S. 1, 17 (1946) and see *McGowan v. Maryland*, 366 U.S. 420, 442-443 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Bradford v. Roberts*, 175 U.S. 291 (1899).

14. As stated by Mr. Justice Powell in *PEARL v. Nyquist*, *supra*, 413 U.S. at 775.

> "These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the

(a) must not be class legislation; and must be
(b) indirect,
(c) incidental, and
(d) neutral, non-ideological.

As summarized below, Acts 194 and 195 clearly meet all these tests.

(a) *This is not class legislation.*

The Acts merely extend to children attending non-public schools, some of the benefits which are already available to children attending public school.

Moreover, the Acts define the benefits in terms of those available to public school students. Thus, by definition no special benefit is made available to one class, non-public students, which is not generally available to public school students.

---

channel is a narrow one, as the above cases illustrate. Of course it is true in each case that the provision of such neutral, non-ideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other non-secular areas. *But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.*" (emphasis supplied).

And in *Sloan v. Lemon*, 413 U.S. at 832

"We think it plain that this [i.e. tuition reimbursement to parents] is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools." (emphasis in original)

Finally, whatever factual records concerning the characteristics of nonpublic schools which were developed in other cases are irrelevant here.[15]

(b) *The benefits, if any, to religiously affiliated institutions are indirect.*

Acts 194 and 195 provide no direct payments to any schools in Pennsylvania. There is, therefore, no possibility of any direct financing of religion or religions education.

Just as the text books in *Allen* and the busing in *Everson*, the benefits provided by the Acts are at most indirect benefits that do not advance religion. (See opinion of Burger, C. J. in *Walz v. Tax Commission*, 397 U.S. 664, at 671-672) and opinions cited in footnote 13, *supra*.

(c) *The benefits are incidental*

The requirement that aid be incidental suggests that benefits to pass constitutional muster must not be the core or content of the teaching program, where the risk of religious content is so great. The incidental benefits under these Acts provide the basic tools of the learning process, tools which are themselves neutral.

Mr. Chief Justice Burger for the Court noted this essential difference in *Lemon v. Kurtzman*, 403 U.S. at 617 where he stated:

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15. Plaintiffs at page 5 of their brief state that the defendants concede that there are schools included as eligible under the Acts having the 10 religious characteristics there referred. This is just not so. We made no such concession (see notes of testimony, pp. 12-18) —and plaintiffs offered no such proof. Since the benefits are all secular, and are for the benefit of the children —not the schools —, the religious attributes of eligible schools are totally irrelevant. Further, such inquiry is beyond the scope of permissible inquiry under the free exercise clause of the very same constitutional provision under which plaintiffs claim to seek protection.

"In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

It is clear that the textbooks,[16] instructional materials and equipment and auxiliary services, are all tools, and are incidental in the sense that they are not the content of the educational program. They are not "an integral part of the teaching process" but rather are the tools from which the content can be acquired.

(d) *The benefits afforded by Acts 194 and 195 are neutral and non-ideological.*

As discussed in the section below, the services provided are neutral and by their very nature, self-policing and do not require surveillance.

C. *The Acts Do Not Foster Undue Entanglement.*

1. *Acts 194 and 195 are self-policing and surveillance is not required.*

Appellants complain, but without supporting evidence, that comprehensive and continuing surveillance is necessary to insure neutrality. This is just not so.

---

16. Textbooks of course do relate to the core of educational content, but they are still only the tools of the educator. But they are "incidental" in both *cost* and *educational importance* compared to the role of the classroom teacher.

Furthermore, textbooks are self policing in insuring secular content since the only textbooks that qualify under the Act are those which are "acceptable for use in any public . . . school".

Finally, textbooks have been held clearly valid under *Allen*, and see *Norwood v. Harrison*, *supra*.

By definition, all the benefits provided under the Acts are neutral, secular and non-ideological.[17] Plaintiffs below offered no evidence to the contrary.

Moreover, the Acts define the benefits in terms of those available to public school students.[18] Therefore, by definition these benefits are self-policing.

The Acts are administered by the same people who provide the same services, materials and equipment, to the public schools. These benefits are admittedly secular and do not require the surveillance suggested by appellants. Furthermore, there is no evidence that the administrative contact between the state and nonpublic schools is any greater than prior to the passage of the Acts when there already were requirements relating to the state's compulsory education requirements, health and safety regulations etc.[19]

Finally, mere administrative entanglement is not sufficient to invalidate otherwise permissible legislation. *Hunt v. McNair, supra, cf. Wheeler v. Barrera, supra.*

---

17. The definition of auxiliary services in Act 194 (see footnote 4 above) limits the benefits to "secular, neutral, non-ideological services." Act 195 defines instructional equipment as "educational, secular, neutral, non-ideological equipment," which is not susceptible to diversion to sectarian uses. Instructional materials include only "secular, neutral, non-ideological materials."

18. Auxiliary services are by definition only services which "are presently or hereafter provided for public school children of the Commonwealth." Instructional equipment and machinery are likewise limited by definition to items which "are presently or hereafter provided for public school children of the Commonwealth." Textbooks are limited to "textbooks which are acceptable for use in any public, elementary or secondary school of the Commonwealth."

19. *E.g.*, 24 P.S. §13-1327, 24 P.S. §§14-401 to 14-122; Law of March 10, 1949, P.L. 30, Art. XII, Section 1303 (repealed 1972) (Smallpox vaccination).

2. *There is no legislative divisiveness*

Appellants argue that the provisions of the Act relating to instructional materials and equipment foster political entanglement, and religious divisiveness. (Appellants' Jurisdictional Statement, pp. 13-14). They offered no evidence to support such a charge.

Since the Acts are for the benefit of all the children of the Commonwealth—attending both public and nonpublic schools, the potential for political divisiveness on religious grounds referred to in *Lemon v. Kurtzman*, *supra*, and *PEARL v. Nyquist*, *supra*, is not present in this case.

Furthermore, unlike the statute condemned in *Lemon v. Kurtzman* (which provided for direct payments to schools), no funds here are paid directly to any schools or religious orders. Thus the schools or religious orders have no direct stake in lobbying for funds.

IV. These Acts Are Distinguishable From Those Held Invalid by the Supreme Court.

A. *Previous cases*

The legislative declarations of purposes of Acts 194 and 195 are completely different from the previous acts held invalid by this Court. In those cases, the legislative declarations indicated the purpose of preserving pluralism and were a response to a crisis in nonpublic schools created by rapidly rising costs. See *Sloan v. Lemon*, 413 U.S. at 829.

Acts 194 and 195 on the other hand, as did the legislation in *Allen*, *supra*, and *Everson*, *supra*, have as their sole legislative purpose the extension of certain limited benefits to *all* school children in Pennsylvania.

Furthermore, the programs established by Acts 194

and 195 are significantly different from all the previous legislative enactments invalidated by this Court.[20]

B. *Public Funds for Public Schools of New Jersey v. Marburger*

On June 17, 1974 this Court affirmed the three judge court decision in *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F.Supp. 29 (D.N.J. 1973) aff'd. — U.S. —, (Nos. 73-120, 73-121, June 17, 1974). Burger, C.J., White and Rehnquist voting to note probable jurisdiction.

Marburger is clearly distinguishable from the Pennsylvania Acts here under consideration.

1. *Class Legislation:*

In *Marburger*, the Court found that the New Jersey Legislative scheme was clearly class legislation designed to benefit religious schools—and conferred a special benefit on parents of nonpublic school children not extended to parents of public school children.

20.

1) *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (purchase of secular educational instruction in traditional subjects) involved *direct* grants to schools and required extensive surveillance to insure non-sectarian teaching.

2) *PEARL v. Nyquist*, 413 U.S. 756 (1973) likewise involved direct money for grants for maintenance and repair of buildings, with no way to separate between religious and non-religious use.

3) *Sloan v. Lemon*, 413 U.S. 825 (1973) struck down a tuition reimbursement program because it was deemed to be class legislation which conferred a special benefit on parents of children attending religious schools.

4) *Levitt v. PEARL*, 413 U.S. 472, provided direct grants to nonpublic schools for testing and teacher prepared tests, but the grants were unrelated to actual cost.

Thus, in New Jersey textbooks were *loaned* to public school children. Because of a *parent reimbursement* provision for textbooks for nonpublic school children,[21] these children owned their books outright.

Under §5 of the New Jersey Act, parents of nonpublic school children could be reimbursed for secular, non-ideological materials and supplies—as well as textbooks. There was no equivalent benefit for parents of public school children.

The lower court in *Marburger* held that because of the absence of state supervision to insure that the materials and supplies were not put to sectarian use, the New Jersey Act provided a benefit to religion, and noted that such supervision would create undue entanglement. Furthermore, to obtain reimbursement, proof had to be given by nonpublic schools to the State showing that the expenditures complied with the Act, thus posing entanglement problems.

The New Jersey statutory scheme contrasts sharply with the Pennsylvania Acts where benefits are furnished through the Department of Education Intermediate Units in the same fashion both to public and nonpublic school children.

In *Marburger*, the Court made a specific finding, that the principal beneficiaries of the Act were religious schools whose financial stability the Act was designed to promote. There is no such finding or evidence in this case.[22]

Finally, in *Marburger*, there was no finding, as in the instant case, that the benefits given to children of non-

---

21. ". . . unlike the legislative programs in *Allen* and *Everson*, the assistance provided by Section 5 is not extended to parents of all students but only to a special class; . . ." 358 F.Supp. at 36.

22. The legislative declaration in *Marburger* in its commitment to preserve pluralism in education is similar to the legislative declaration struck down in *Lemon v. Kurtzman* and *PEARL v. Nyquist* and is unlike the limited goals set forth in Acts 194 and 195.

public schools were merely an extension of the same benefits currently given to children in public schools.

2. *Entanglement*

The *Marburger* court invalidated §6 of the New Jersey Act because of the potential for administrative entanglement. The New Jersey Administrative Code §6-2(f) (quoted in full in *Marburger*, 358 F.Supp. at 39 required:

> " . . . Such [auxiliary] services are to be provided on the basis of mutually satisfactory arrangements between the nonpublic school and the local board of education. Both the nonpublic school and the local board of education shall make good faith efforts to reach these mutually satisfactory arrangements."

The New Jersey court, 358 F.Supp. at 40, construed this provision to require the local school board "to inquire into the religious procedures and curricula of the non-public school", and, therefore, held that section invalid on the grounds of entanglement.

There is nothing in Acts 194 and 195 which can be construed as permitting inquiry by the Intermediate Units into the religious procedures and curricula of nonpublic schools.

The services in the Pennsylvania Acts are defined by the Legislature. It has not given the local units discretion to negotiate with nonpublic schools concerning the educational desirability of any particular service. These Acts, therefore, do not pose the potential for administrative entanglement present in *Marburger*.

CONCLUSION

The recent decisions by this Court including this Court's opinion in *Wheeler v. Barrera*[23] indicate clearly that it has not retreated from the holdings of *Allen* and *Everson*.

The benefits provided under Acts 194 and 195 correspond to the provisions providing for textbooks to all school children upheld in *Allen* or the reimbursement for providing bus transportation to all school pupils upheld in *Everson*.

The provisions of Acts 194 and 195, meet the requirements set forth by Mr. Justice Powell in *PEARL v. Nyquist* and *Sloan v. Lemon:*

> 1) The benefits are not provided to a specific class but rather are afforded to all Pennsylvania school children.
>
> 2) The aid is indirect, no direct payments are made to any schools and no lump sum payment is made which would enable a school to use any excess for some other purpose.
>
> 3) The benefits are incidental in that they are not the core or content of the teaching process where the pressure for religious content are greatest.

---

23. In *Wheeler v. Barrera* (No. 73-62, June 10, 1974), this Court considered questions presented by Title I of the Elementary and Secondary Education Act of 1965, as amended, 21 U.S.C. §— *et seq.*, which authorizes educational assistance for both private and public school children.

The Court did not directly rule on the constitutionality of a state program under Title I in which public school teachers entered private schools, facilities, holding that it was not necessary under the circumstances to decide that question.

Nevertheless, the opinions seem to indicate that it is possible to provide comparable Title I programs for public and private school children.

4) The benefits are neutral and non-ideological.

5) The problems of entanglement which struck down purchase of service contracts in *Lemon v. Kurtzman* are not here present.

In summary then, we request this Court to affirm the carefully reasoned opinion of the Court below on the grounds that appellants have failed to offer any evidence that the effect of the Acts is other than its stated purpose and that the Acts on their face are constitutional. Thus they present no substantial federal question warranting plenary review by this Court.

Respectfully submitted,

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Chesik, et al.

In the Supreme Court of the United States

October Term, 1973
No. 1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
Appellants

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,
Appellees

and

JOSE DIAZ and ENILDA DIAZ, His Wife et al.,
Intervening Parties Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM OF APPELLEES PITTENGER AND SLOAN

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MOTION TO DISMISS OR AFFIRM OF APPELLEES PITTENGER AND SLOAN

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

Pursuant to Rule 16 of the Rules of this Court, the appellees, John C. Pittenger and Grace M. Sloan move to dismiss the appeal or to affirm the judgment of the Court below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

STATEMENT OF THE CASE

This appeal challenges the constitutionality of two amendments to the Public School Code of 1949, Pa. Stat. tit. 24, Sections 1-101 et seq., on the ground that these amendments violate the Establishment Clause of the First Amendment. The Public School Code embodies a comprehensive scheme for educating all children of elementary and secondary school age. The specific statutes challenged in this proceeding are Act 194 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (Supp. 1974) (hereinafter, "Act 194") and Act 195 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (hereinafter, "Act 195").

Act 194 (Jurisdictional Statement at 108a) states that the Commonwealth will provide specific "auxiliary services" on an individual basis, to those nonpublic school children who require services beyond those available as part of a general instructional program. All the "auxiliary services" authorized by Act 194 are presently provided for public school children. Act 195 (Jurisdictional Statement at 111a) authorizes the loan to nonpublic school children of textbooks which are acceptable for use in public schools. In addition, Act 195 also authorizes the loan of such instructional equipment and materials as are useful to the education of such children and which are "presently or hereafter provided for public school children" (Jurisdictional Statement at 113a, 114a). The instructional materials and equipment must be secular, neutral and non-ideological in nature.

After a full evidentiary hearing, which detailed the manner in which these state programs operate, a three judge District Court upheld the constitutionality of Act 194. The Court also upheld the constitutionality of Act 195 with the limitation that the only equipment which could be loaned is equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, Jurisdictional Statement at 102a-103a).

ARGUMENT

This Appeal Presents No Substantial Federal Question

1. The District Court Opinion

The majority opinion of the three judge court in this case contains such an excellent analysis of all the relevant decisions of this Court in the Establishment Clause area, and the opinion so carefully applies the principles gleaned from that analysis to the Pennsylvania programs challenged in this case that the District Court's opinion makes further review by this Court of the questions raised in this case unnecessary.

In the last few years, this Court has spoken often on the scope of the Establishment Clause, especially in the area of education. All parties to this case would freely admit that with the exception of *Everson v. Board of Education,* 330 U.S. 1 (1947), all of the relevant pronouncements of this Court which bear on the questions raised in this case have been rendered within the last six years. "As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of 'entangling' precedents" *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 761 (1973). This Court's precedents, of course, are controlling. Moreover, though it is certainly this Court's first task to resolve the specific case before it, it is equally true that in deciding cases this Court has articu-

lated those principles—those "cumulative criteria"—which should govern related cases. The majority opinion of the District Court has drawn exclusively upon this Court's opinions in the Establishment Clause area in determining that the Pennsylvania programs comply with that constitutional mandate.[1]

The District Court's Opinion announces no new rule of law in the Establishment Clause area. It has

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[1] This Court summarily affirmed the judgment of the United States District Court for the District of New Jersey in *Marburger v. Public Funds for Public Schools of New Jersey*, No. 73-120, 42 U.S.L.W. (U.S. June 17, 1974). The New Jersey programs invalidated in *Marburger* are readily distinguishable from the Pennsylvania programs challenged in this proceeding. The reimbursement features of the New Jersey Act are, of course, akin to the New York reimbursement proposal invalidated in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) whereas Acts 194 and 195, when read *in pari materia* with other provisions of the Public School Code, are remarkably akin to the uniform textbook loan program found constitutional in *Board of Education v. Allen*, 392 U.S. 236 (1968). As to the relative weight to be given to this Court's summary affirmances, see generally *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974).

The limited precedential value of *Marburger* is underscored by the fact that the majority in the instant case, well aware of the lower court's decision, makes no reference to it in its opinion, and the dissent refers to it only twice and in passing (Dissenting Opinion, Jurisdictional Statement at 64a, 68a).

The precedential value of *Marburger* is further dissipated by this Court's reservation of the Establishment Clause issue in *Wheeler v. Barrera*, 42 U.S.L.W. 4877 (U.S. June 10, 1974), a decision rendered one week before the summary affirmance in *Marburger*, and a case dealing with a federal aid to education program similar in many respects to the Pennsylvania statutes challenged in this appeal.

simply applied existing rules gained from a review of this Court's decisions to State programs aimed at equalizing educational services for the children of Pennsylvania. Moreover, in concluding that this Court's decisions do not render Acts 194 and 195 unconstitutional, this Court had the benefit of a record which fully presented the manner in which the State programs operate. This, of course, was essential since it assured that the District Court had a firm grasp of the functioning of these programs and their self-limiting characteristics.[2]

2. *The Jurisdictional Statement*

Appellants' Jurisdictional Statement treats each of the four aspects of Acts 194 and 195 separately.[3] That of course, is the only manner in which to properly review

[2] "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the court. Usually it requires a careful evaluation of the facts of the particular case. . . . A federal court does not sit to render a decision on hypothetical facts . . ." *Wheeler v. Barrera*, 42 U.S.L.W. 4877, 4885 (U.S. June 10, 1974).

[3] Although appellants make some statement about viewing the statutes as a whole, it is difficult to see what point, if any, they are attempting to make by that statement. In any event, the most surface reading of the cases cited in support of the proposition that the Acts should be viewed as a whole will indicate that they clearly stand for a directly contrary proposition. Moreover, this Court has invariably given separate treatment to distinct and separate aspects of a statute in determining whether each part of the statute complies with the Constitution. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

the distinct and separate aspects of the four state programs. It is necessary to briefly review the arguments raised in the Jurisdictional Statement in order to show how the disposition of these arguments by the District Court's opinion have rendered them unsubstantial.[4]

Auxiliary Services:

Appellant first challenges the Auxiliary Service program. They contend that that program is open ended and in doing so place chief reliance on *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Moreover, they predicate their argument on a utopian portrait of a school system wherein "Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential" (Jurisdictional Statement at 12). Appellants thus argue that such services are nothing more than a normal part of a school's operating budget. This argument is facially unsound. Appellants are, in effect, saying that there is no such thing as an "auxiliary" service in education. The record simply does not support such a bold assertion, nor does it support the specific assertion that the providing of individual assistance to children requiring services beyond that available in a general instructional program is part of the normal operating costs of a school. Majority Opinion, Jurisdictional Statement at 30a-35a.

Appellant argues that the Auxiliary Services program is so open ended that it would countenance the

[4] All of these arguments have previously been made to the District Court.